Supreme Court, U.S.
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No. 96-1507

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LA FUERZA AEREA BOLIVIANA,
an Agency or Instrumentality of the
Republic of Bolivia, a Foreign State,
Petitioner,

v.

TRANSAERO, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is an agency or instrumentality of a foreign sovereign entitled to interlocutory appellate review of the district court's denial of its claim that a seven-old-default judgment entered against it is allegedly void for an alleged technical defect in service of process under the following circumstances:

(1) the district court has previously issued two separate decisions holding that both personal and subject matter jurisdiction existed over the agency or instrumentality at the time judgment was entered;

(2) the appellate court has already issued two decisions affirming those earlier rulings and has remanded the case back to the lower court for further proceedings to re-examine the proper calculation of interest contained in the judgment;

(3) the third district court ruling on jurisdiction for which the agency or instrumentality of the foreign sovereign seeks interlocutory appellate review was issued in the proceedings on remand from the two earlier appellate court decisions; and

(4) the proceedings on remand are not yet complete?

PARTIES BELOW AND CORPORATE DISCLOSURE STATEMENT

The parties in the proceeding below were the following:

Transaero, Inc., a privately-held company which is headquartered in New York State. It has no parent companies, subsidiaries, or affiliates which have any outstanding securities in the hands of the public. Its primary line of business is in the aviation equipment and services industry.

La Fuerza Aerea Boliviana, the Air Force of the Republic of Bolivia.

GLOSSARY

Throughout this Petition, the term "FSIA" refers to the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 -1611.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Transaero, Inc., Respondent herein, prays that Petitioner's request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case be denied.

STATEMENT OF THE CASE

There are many interesting legal issues in this case. However, the one that the Petitioner, the Bolivian Air Force, is asking this Court to review is not one of them. While a more

detailed history of this procedurally unique case is set forth below, all this Court really needs to know to dispose of the instant petition is that this case involves the repeated efforts of the Petitioner, the Bolivian Air Force, to challenge the validity of a default judgment rendered against it by the United States District Court for the Eastern District of New York in 1989. The 1995 district court order for which the Petitioner claims the right of interlocutory appellate review is the **third** ruling by the lower court judge that the 1989 judgment is valid. This decision was issued in proceedings on remand from **two** earlier Second Circuit decisions issued in 1994 which affirmed the lower court's two earlier rulings that it properly exercised jurisdiction over the Bolivian Air Force when entering judgment in 1989. *See, Transaero, Inc., v. La Fuerza Aerea Boliviana,* 24 F.3d 457 (2d Cir. 1994)("*Transaero I*"); *Transaero, Inc., v. La Fuerza Aerea Boliviana,* 38 F.3d 648 (2d Cir. 1994)("*Transaero III*"). The second 1994 decision of the Second Circuit in *Transaero III* specifically reviewed and declined to void the 1989 judgment based on the split 1994 decision of the D.C. Circuit in *Transaero, Inc., v. La Fuerza Aerea Boliviana,* 30 F.3d 148 (D.C.Cir.1994), *cert. denied*, 115 S.Ct. 1101 (1995)("*Transaero II*"), holding in collateral proceedings that the judgment was void due to allegedly defective service of process.

Petitioner never asked this Court to review these earlier decisions of the Second Circuit. Instead, in proceedings on remand from these two earlier decisions of the Second Circuit, it brought yet another motion in the lower court seeking to set aside the judgment on jurisdictional grounds. These proceedings are limited to verifying whether the amount of the 1989 judgment is correctly calculated. **They are being held at**

the request of the Petitioner as a result of the proceedings it initiated in 1993. They are not yet completed.

It is in this procedural context that the Second Circuit held that it lacked jurisdiction to hear the Petitioner's appeal. *Transaero, Inc., v. La Fuerza Aerea Bovliviana*, 99 F.3d 538 (2d Cir. 1996)("*Transaero IV*"). In insisting that it is entitled to an interlocutory appeal of the **third** decision of the lower court judge finding valid jurisdiction, the Petitioner is simply seeking to delay completion of the proceedings on remand and the ability of Respondent to enforce what has repeatedly been held to be a valid judgment.

Procedural History of the Case

In 1988, Respondent brought suit in the Eastern District of New York seeking recovery of a contractual breach of a finance agreement with the Bolivian Air Force. Every court addressing this issue has held that the Bolivian Air Force had actual notice of this suit and was properly served under *28 U.S.C. §1608(b)* as an agency or instrumentality of the Republic of Bolivia under the FSIA. *See, e.g., Transaero, Inc., v. La Fuerza Aerea Boliviana,* 30 F.3d 148 (D.C. Cir. 1994). However, the Air Force chose not to enter an appearance. A default was entered and, after notice and hearing, the Honorable Jacob A. Mishler, Senior Judge, entered a judgment against the Air Force in April, 1989.

The Air Force did nothing to set aside the judgment. In 1992, after having registered the judgment in the United States District Court for the District of Columbia, Transaero served interrogatories upon the Air Force in an effort to discover its assets. The Air Force then entered an appearance in the District of Columbia, seeking to quash discovery and declare the

judgment void on the grounds that it should have been served under the provisions of the FSIA governing service of process for foreign states, *28 U.S.C. §1608(a),* rather than agencies or instrumentalities of a foreign state, *28 U.S.C. §1608(b).* In September, 1992, the Hon. George Revercomb held that the Air Force was properly served under the FSIA and that the 1989 judgment was valid. The Air Force appealed this decision to the D.C. Circuit.

While the D.C. Circuit appeal was pending, the Air Force changed counsel and hired Williams & Connolly. In May, 1993, the Air Force voluntarily entered an appearance in the Eastern District of New York, alleging that the 1989 judgment was void under Federal Rule of Civil Procedure 60(b)(4) and claiming that the judgment had been procured by a "fraud on the court." Judge Mishler denied this motion in an unpublished decision, holding that the Eastern District did have subject matter jurisdiction in 1989 and dismissing the fraud on the court allegations as "straining credulity." Memorandum Decision and Order dated August 12, 1993, *Transaero v. La Fuerza Aerea Boliviana*, No. 88-CV-2788 (E.D.N.Y.). The Air Force appealed this decision to the Second Circuit. The very first sentence of the Air Force's opening brief on appeal in the Second Circuit stated that "The district court's subject matter jurisdiction is at issue in this appeal." Brief of Defendant-Appellant La Fuerza Aerea Boliviana at 1, *Transaero, Inc., v. La Fuerza Aerea Boliviana,* 24 F.3d 457 (2d Cir. 1994)(No. 93-7903).

In April, 1994, the Second Circuit issued its first decision in this case, affirming Judge Mishler's ruling that the Eastern District had subject matter jurisdiction in 1989 and

rejecting the "fraud on the court" allegations. *Transaero v. La Fuerza Aerea Boliviana*, 24 F.3d 457 (2d Cir. 1994)(*"Transaero I"*). The Second Circuit did remand the case back to Judge Mishler for further limited proceedings to examine two issues that Transaero had neglected to address in its brief on appeal: whether the 1989 judgment was properly calculated based on the Air Force's allegations that interest had been charged for too many months and at the wrong rate. *Id.* The Air Force filed a petition for rehearing.

Although counsel for Transaero immediately informed the D.C. Circuit that it was their opinion that the ruling of the Second Circuit was dispositive of the matters on appeal in the D.C. Circuit, in June, 1994, the D.C. Circuit issued a split decision holding that the Air Force should have been served under provisions of the FSIA governing service of foreign states. It thus held that the 1989 judgment was void and unenforceable. *Transaero, Inc., v. La Fuerza Aerea Boliviana*, 30 F.3d 148 (D.C. Cir. 1994)(*"Transaero II"*). Transaero filed a petition for certiorari of this decision to this Court, which was denied. *Transaero, Inc., v. La Fuerza Aerea Boliviana*, 115 S.Ct. 1101 (1995).

In the interim, the Second Circuit requested a briefing by the parties as to whether its earlier decision affirming the 1989 judgment should be set aside due to the D.C. Circuit's decision. Upon a full briefing, the Second Circuit reaffirmed the validity of the judgment and its earlier decision, and remanded the case back to Judge Mishler. *Transaero, Inc., v. La Fuerza Aerea Boliviana,* 38 F.3d 648 (2d Cir. 1994)(*"Transaero III"*). In doing so, it further expanded the lower court's mandate to determine the proper date for

cessation of interest. *Id.* The Air Force did not seek this Court's review of either of the Second Circuit's decisions.

On remand in the Eastern District of New York from *Transaero I* and *III* in 1995, Transaero filed a motion to modify the judgment. The lower court has never ruled on that motion, however, because the Air Force brought a motion under Rule 60(b)(4) seeking to declare the judgment void based on the D.C. Circuit's decision. Judge Mishler denied that motion, again reaffirming the validity of the judgment, in decisions dated August 4, 1995 and August 22, 1995. *Transaero, Inc., v. La Fuerza Aerea Boliviana*, 88-CV-2788 (E.D.N.Y.)(reproduced as Appendixes C and D to Petitioner's application). He ordered Transaero to produce limited discovery in accordance with the issues on remand from the Second Circuit, and scheduled a hearing date of September 15, 1995.

The Air Force subsequently filed an interlocutory appeal to the Second Circuit for a review of these orders. That court stayed the proceedings before Judge Mishler. After a full briefing and oral argument, the Second Circuit held that it lacked interlocutory jurisdiction over the appeal because the Air Force was not claiming that the 1989 judgment was void because it was immune from suit, only that it should not be subject to the judgment because it was allegedly void for alleged improper service. *Transaero, Inc., v. La Fuerza Aerea Boliviana*, 99 F.3d 538 (2d Cir. 1996)("*Transaero IV*"). The Second Circuit remanded the case back to Judge Mishler so he could complete the limited proceedings mandated by its two 1994 decisions. The Air Force's petitions for rehearing and rehearing en banc were denied and the case returned to the

lower court on January 16, 1997. The Air Force subsequently filed its current writ for petition of certiorari to this Court, disposition of which is pending.

Simultaneous requests by the Air Force for emergency stays of the lower court proceedings on remand pending disposition of its instant petition were denied by both the Second Circuit and Justice Ginsburg on April 3, 1997. However, Judge Mishler has issued an order dated April 4, 1997, indicating that all proceedings in the lower court will be held in abeyance pending this Court's disposition of the instant petition.

REASONS FOR DENYING THE WRIT

This petition can and should be easily denied. The Petitioner, the Bolivian Air Force, has misstated the issue involved in this case. Notwithstanding its assertions to the contrary, the Bolivian Air Force is not claiming that it is immune from the jurisdiction of the United States courts, i.e., that it is entitled to sovereign immunity. All it is claiming is that a judgment entered against it in 1989, in proceedings that every court ruling on this issue has found it had actual notice of, is allegedly void due to an alleged technical defect of service of process.

The Air Force's claim is thus one of immunity from judgment, not immunity from suit. This distinction is clearly recognized in the precedent of this Court, which holds that claims of immunity from judgment are not final judgments entitled to immediate interlocutory review under the collateral order doctrine. The decision of the United States Court of Appeals for the Second Circuit relies upon and follows the

precedent of this Court. There is no conflict with the decisions of this Court, nor any need to review the Second Circuit's ruling.

Similarly, no great foreign policy issues are at stake in the Second Circuit's decision. Contrary to the assertions of the Petitioner, the federal appellate courts have all recognized and applied the same distinctions made by the Second Circuit in this case. While denials of claims involving subject matter jurisdiction over foreign sovereigns raise immediate questions regarding immunity from suit which allow interlocutory appeals, denials of other types of immunity claims are not immediately reviewable, because they involve claims of immunity from judgment.

The federal circuits have also held that foreign sovereigns - especially the Republic of Bolivia - are no different that private litigants with respect to their obligations in adhering to the rules governing procedure and jurisdiction in federal courts, especially with respect to bringing challenges to the validity of default judgments. There is thus no conflict in the federal circuits on this issue.

I. THE SECOND CIRCUIT'S DECISION PROPERLY FOLLOWED AND APPLIED THE PRECEDENT OF THIS COURT.

A. The Petitioner Is Not Claiming An Immunity From Suit But Merely An Immunity From Judgment.

The August, 1995 lower court rulings for which the Air Force seeks an interlocutory appeal merely refused to apply and

follow the decision of the United States Court of Appeals for the District of Columbia in *Transaero II. Transaero, Inc., v. La Fuerza Aerea Boliviana,* 30 F.3d 148 (D.C.Cir. 1994). In that decision, the District of Columbia Circuit never held that the Air Force was immune from suit under the FSIA. It merely held that the 1989 judgment that Judge Mishler rendered against the Air Force was void because, in that court's opinion, the Air Force had been improperly served as an agency or instrumentality under the provisions of Section 1608(b), rather than Section 1608(a), of the FSIA. That court's determination did not constitute a ruling immunizing the Air Force from suit on the underlying subject matter of Transaero's claims. It simply ruled that the 1989 judgment was unenforceable because personal jurisdiction over the Air Force had allegedly not been properly asserted.

Judge Mishler's August, 1995 rulings refusing to apply and follow the D.C. Circuit's decision are, from a procedural posture, thus no different than a denial of a motion to dismiss a complaint or vacate a judgement on personal jurisdiction grounds. Such motions are generally not subject to interlocutory appeal under the "collateral order" doctrine. *See generally, Catlin v. United States*, 324 U.S. 229, 236, 89 L Ed 918 (1944); Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d §* 3911.4, pages 421-426.

B. A Foreign Sovereign Is Not Entitled To An Interlocutory Review Of A District Court Denial Of Its Motion To Set Aside A Seven-Year-Old Judgment Allegedly Void Due To Alleged Defective Service When The District Court Has Already Twice Held That It Had Personal and Subject Matter Jurisdiction Over The Foreign Sovereign And That Ruling Has Twice Been Affirmed By The Appellate Court.

It is correct that most courts addressing the issue, including the Second Circuit, have held that immediate appellate court jurisdiction exists over interlocutory appeals of foreign sovereigns invoking immunity from suit under the Foreign Sovereign Immunities Act. However, as the Second Circuit clearly stated in an earlier case, such appeals have been permitted when the subject matter jurisdiction of the court under the FSIA is at issue. *Drexel Burnham Lambert v. Committee of Receivers,* 12 F.3d 317, 324 (2d Cir. 1993). An examination of this Court's decisions relied upon by the Second Circuit in its decision in this case indicates that a different result occurs when the sole question involved is one of improper service of process under the FSIA.

In *Mitchell v. Forsyth,* 472 U.S. 511, 526, 86 L Ed 2d 411, 425, this Court held that the "immunity from suit" exception allowing immediate appeal of orders denying immunity motions in otherwise non-final proceedings is intended to protect an entitlement not to stand trial under any circumstances, not merely a defense to liability. As the Ninth Circuit stated in holding that the denial of sovereign immunity to branches of the federal government is not an immediately appealable collateral order:

> [T]he Supreme Court has observed that "orders denying certain immunities are strong candidates for prompt appeal under § 1291." This is because certain immunities are more likely to meet the third prong of the *Cohen* analysis: where the immunity guarantees a "right not to stand trial," that right may be "irretrievably lost" if immediate review is not available. The Supreme Court in *Digital Equipment* [*Digital Equipment Corp. v. Desktop Direct, Inc.*, -- U.S.--, 114 S.Ct. 1992, 1998, 128 L. Ed.2d 842 (1994)] hastened to add, however, that "a party's ability to characterize a district court's decision as denying an irreparable 'right not to stand trial' altogether is [not] sufficient... for a collateral order appeal," because virtually every right or procedural step that can be enforced by pretrial dismissal could be characterized as a right not to stand trial."

State of Alaska v. United States, 64 F.3d 1352, 1355 (9th Cir. 1995)(citations omitted).

The Seventh Circuit has stated, in a case which also held that rulings denying claims of sovereign immunity by the United States are not immediately appealable, that it:

> is necessary to distinguish between a right not to be sued and a right the vindication of which ends the litigation. *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 269, 102 S.Ct. 3081, 3084, 73 L.Ed.2d 754 (1982); *United States v. MacDonald,* 435 U.S. 850, 860 n. 7, 98 S.Ct. 1547, 1552 n.7, 56 L.Ed.2d 18 (1978). Only an "explicit statutory or constitutional

> guarantee that trial will not occur" creates the sort of right that supports immediate review. *Midland Asphalt Corp. V. United States*, 489 U.S. 794, 801, 109 S.Ct. 1494, 1499, 103 L.Ed.2d 879 (1989). *See also, e.g., Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 109 S.Ct. 1976, 104 L.Ed.2d 548 (1989).

Pullman Construction Industries, Inc., v. United States, 23 F.3d 1166, 1169 (7th Cir. 1994). Denials of claims of immunity from subject matter jurisdiction under the FSIA fall within this criteria, since that act specifically sets forth those circumstances under which a foreign sovereign may be sued in U.S. courts. Absent subject matter jurisdiction under the FSIA, foreign sovereigns are entitled to sovereign immunity from suit in U.S. courts. *See, 28 U.S.C. § 1604.* Accordingly, the denial of a claim of lack of subject matter jurisdiction under the FSIA constitutes a denial of a right not to be sued. *See, e.g., McKesson Corporation v. Islamic Republic of Iran*, 52 F.3d 346 (D.C.Cir. 1995).

However, the service of process provisions of the FSIA do not confer an immunity on foreign sovereigns from suit but merely set forth how a foreign sovereign must be served when it is otherwise subject to suit in a U.S. court due to the existence of subject matter jurisdiction under the FSIA. *See, 28 U.S.C. § 1608.* Invoking improper service of process under the FSIA alone is thus not a claim of immunity from suit, but merely a defense to liability.

As the Second Circuit correctly noted in the decision under review, in *Van Cauwenberghe v. Biard*, 485 U.S. 517, 526-527 (1988), this Court found that a claim of immunity from service of process under extradition statutes and treaties is different than a claim of immunity from suit because the right not to stand trial is not an essential aspect of the claim. This Court

thus held that a district court's denial of a motion to dismiss on such grounds is not an immediately appealable collateral order, citing *Catlin v. United States*, 324 U.S. at 236. *Id.*

Other federal appellate court decisions have applied this distinction to cases involving the Foreign Sovereign Immunities Act. For example, in *Caribbean Trading v. Nigerian National Petroleum*, 948 F.2d 111 (1991), the Second Circuit held that a district court order requiring a foreign sovereign to post security was not subject to immediate appeal under the collateral order doctrine even though the FSIA immunizes the property of foreign governments from attachment except under specified circumstances. The Second Circuit held that merely requiring the posting of security did not invoke the foreign sovereign's claim of the right not to be sued. As the Second Circuit stated:

> such an order is not analogous to either a sovereign immunity claim or an immunity claim under Section 1604. In those cases, costly proceedings would follow an erroneous denial of the claim unless the order were appealable. In such a case, the litigant, be it a domestic sovereign or foreign state, would ultimately prevail but only after bearing the cost of a trial. This ultimate success would not redress the erroneous denial of an immunity from trial itself.

948 F.2d at 114.

As in *Caribbean Trading* and *Van Cauwenberghe*, the claim of the Petitioner Air Force in this appeal is not that it has an absolute right not to stand trial, but merely that another court has found in a collateral proceeding that the 1989 judgment which forms the foundation of the proceedings before the lower court was based on improper service of process and should be

vacated. The right now being claimed by the Air Force is that it should be free of liability from the 1989 judgment, not that it should be free of having suit brought against it in the U.S. courts for the claims of Transaero reflected in that judgment.

Indeed, the Air Force has contended throughout these proceedings that should the judgment be vacated, Transaero would remain free to "refile its Complaint the next day and have a full judicial inquiry into its claims." Brief of Defendant-Appellant La Fuerza Aerea Boliviana at 14, *Transaero, Inc., v. La Fuerza Aerea Boliviana,* 99 F.3d 538 (2d Cir. 1996)(No. 95-7855). Such an action would result in a full scale relitigation of Transaero's claims against it - exactly the opposite of any claim of an immunity from standing trial. The Air Force's claim is thus not one which would otherwise fall within the scope of those that are immediately appealable on grounds of a denial of immunity.

II. THE SECOND CIRCUIT HAS NOT UNDERMINED THE UNIFORMITY OF FEDERAL LAW THAT WAS THE EXPRESS PURPOSE OF THE FOREIGN SOVEREIGN IMMUNITIES ACT.

The history of this case clearly demonstrates that the Second Circuit's decision does not undermine the uniformity of purpose of the Foreign Sovereign Immunities Act. Virtually every case that the Petitioner has cited to this Court in support of its claim that the federal circuit courts have adopted a rule allowing immediate interlocutory appeals of denials of sovereign immunity under the FSIA have involved challenges to the exercise of subject matter jurisdiction under that Act. As a matter of course, many of these cases also involve challenges to the exercise of personal jurisdiction. None of these cases have the same procedural posture as this case, where the

appellate court has already disposed of the subject matter and personal jurisdiction challenge of the foreign government in earlier rulings by holding that such jurisdiction existed prior to the entry of judgment.[1] *See, Transaero I* and *III*. This case may thus be one of first impression among the federal circuits.

The unique procedural context of this case makes it a poor candidate to review any questions this Court may have about the general right of foreign sovereigns to engage in interlocutory appeals, even with respect to challenges of service of process. All the Second Circuit has said in its most recent decision is that pursuant to the rulings of this Court, the Air Force must await the completion of the proceedings on remand before seeking a review of the **third** ruling of the lower court judge affirming the jurisdictional validity of the 1989 judgment. *See, Transaero IV, citing Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949); *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Lauro Lines S.R.L. v. Chaser*, 490 U.S. 495 (1989); *Van Cauwenberghe v. Biard*, 486 U.S. 517 (1988); and *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424 (1985).

Since these proceedings are being held at the specific request of the Air Force as the result of proceedings that it initiated in 1993, this case is procedurally unlike those involving most foreign sovereigns, where a foreign government may seek an interlocutory appeal to review the first decision of a lower court

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1. The Petitioner Air Force is attempting to seriously mislead this Court to the extent that it has stated that there is an open question of subject matter jurisdiction in this case. The Second Circuit explicitly disposed of this question in its decisions in *Transaero I* and *III*. Indeed, the opening sentence of the Air Force's first brief in its first appeal to the Second Circuit was "The subject matter jurisdiction of the district court is at issue in this appeal." Brief of Defendant-Appellant La Fuerza Aerea Boliviana at 1, *Transaero, Inc., v. La Fuerza Aerea Boliviana*, 24 F.3d 457 (2d Cir. 1994)(No. 93-7903).

as to whether both proper personal and subject matter jurisdiction exist over the foreign sovereign.

The purpose behind allowing immediate appeals of orders denying sovereign immunity to foreign governments under the FSIA is to avoid subjecting them to extensive litigation that they would be otherwise entitled to avoid by virtue of their sovereign immunity. *See, e.g., Caribbean Trading,* 948 F.2d at 114. *McKesson Corporation v. Islamic Republic of Iran*, 52 F.3d 346 (D.C.Cir. 1995). However, exactly the opposite is the situation in this case. Here, the Air Force voluntarily entered an appearance in the lower court in 1993 in an effort to set aside a default judgment. It voluntarily initiated and engaged in extensive litigation. It did not get what it wanted: both the district and appellate courts affirmed the existence of jurisdiction and the validity of the judgment. *See, e.g., Transaero I* and *III*. The most recent challenge brought by the Air Force simply represents a third bite at the apple. [2]

The Second Circuit's determination that the Air Force's appeal of Judge Mishler's August, 1995 orders must wait until Judge Mishler has completed the proceedings that the Second Circuit had previously remanded to him at the Air Force's request thus does not involve any uniform policy regarding the right of foreign sovereigns to be free from trial or intrusive proceedings under the Foreign Sovereign Immunities Act.

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2. The Second Circuit has clearly ruled that proper personal jurisdiction is being exercised over the Air Force by refusing to vacate its decision in *Transaero I* in light of the D.C. Circuit's split decision in *Transaero II*. By refusing to set aside the judgment and ordering the Air Force to participate in additional proceedings on remand, the Second Circuit has clearly stated that personal jurisdiction exists. *Transaero III*. The August 4, 1995 lower court decision for which the Air Force seeks interlocutory appellate review merely sets forth and discusses the precedent of this Court that dictates such a result.

III. THE SECOND CIRCUIT'S DECISION CREATES NO UNCERTAINTY FOR FOREIGN SOVEREIGNS. IT HAS NO SIGNIFICANT FOREIGN POLICY IMPLICATIONS.

Finally, contrary to the contentions of the Air Force, the Second Circuit's decision does not create uncertainty for foreign sovereigns, especially the Government of Bolivia. The federal appellate courts have been very clear that with respect to questions of personal jurisdiction, foreign governments should pay careful attention to the fact that such challenges must be brought according to the procedural rules of the federal courts. Indeed, the D.C. Circuit has specifically cautioned the Government of Bolivia that should it so desire it may ignore proceedings brought against it in the U.S. courts and seek to bring jurisdictional challenges to enforcement of any default judgments rendered against it, but that it bears the procedural risks related to that tactic. *See, Practical Concepts, Inc., v. Republic of Bolivia,* 811 F.2d 1543, 1547-1548 (D.C.Cir. 1987).

The Second Circuit's decision is thus no different than those of other courts, including this Court, which have held that foreign sovereigns may waive challenges to personal jurisdiction, even if brought in interlocutory appeals, if not raised at the appropriate procedural posture. See, e.g., *Insurance Corp. of Ireland, Ltd., v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 703-07, 102 S.Ct. 2099, 2104-07, 72 L.Ed.2d 492 (1982)(noting that a constitutional *in personam* jurisdiction claim is waived if not timely raised); *Foremost-McKesson, Inc., v. The Islamic Republic of Iran,* 905 F.2d 438, 443 (D.C.Cir. 1990)(holding that challenge to *in personam* jurisdiction would not be considered in interlocutory appeal since not properly raised below).

While due deference must and should be given to the

immunity of foreign sovereigns where appropriate and required by statute, the Foreign Sovereign Immunities Act in general treats foreign sovereigns as being ordinary litigants subject to the same rights and procedural rules of the federal courts as other litigants. The statute contains no explicit provisions allowing for interlocutory appeals, and the interlocutory appeals which have been allowed for foreign sovereigns have been developed by the courts pursuant to the guidelines of this Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed 1528 (1949). *See, e.g., McKesson Corp. v. Islamic Republic of Iran,* 52 F.3d 346 (D.C. 1995); *Cf., Mobil Corporation v. Abeille General Insurance Co.,* 984 F.2d 664 (5th Cir. 1993)(order remanding removed case back to state court upon a finding that the defendant was not a foreign sovereign entitled to foreign sovereign immunity under the FSIA was not subject to immediate interlocutory appeal because Congress had not amended the statute governing such appeals.)

Uniformity and certainty for litigants arise from well-established and uniformly applied rules of procedure and jurisdiction. The Air Force is asking this Court to create an exception to the rules which govern all litigants, even foreign sovereigns. Exceptions to general rules create uncertainty, not vice versa. The petition should be denied.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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